Ho Ken Seng v Progressive Insurance Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-03(IM)-82 OF 2010

LOW HOP BING, ABU SAMAH AND ANANTHAM KASINATHER JJCA

11 NOVEMBER 2011

Bankruptcy — Capacity of bankrupt — Competency to maintain appeal — Appeal against dismissal of application to strike out/set aside bankruptcy notice, service and creditor's petition and against adjudication and receiving orders — Sanction of Director General of Insolvency under s 38(1)(a) Bankruptcy Act 1967 ('the Act') not obtained — Appeals lodged under s 92 of the Act — Whether bankrupt was 'maintaining an action' — Whether s 38 (1)(a) of the Act applied when s 92 was invoked

The appellant/judgment debtor ('the bankrupt') had filed an application to strike out or set aside the bankruptcy notice, the service thereof and the creditor's petition in bankruptcy proceedings filed against him by the respondent/judgment creditor. The application was dismissed by the registrar. An appeal was filed against that decision to the judge in chambers (encl 26). Before the appeal could be heard, the respondent obtained adjudication and receiving orders ('AORO') against the bankrupt. An appeal against the AORO to the judge in chambers was filed (encl 29). Subsequently, both encls 26 and 29 were heard by the judge and dismissed. The bankrupt appealed the dismissals to the Court of Appeal. At the Court of Appeal, the respondent filed a notice of motion to strike out the bankrupt's appeals on the ground he was incompetent to maintain the appeals as he had not obtained the sanction of the Director General of Insolvency ('DGI') pursuant to s 38(1)(a) of the Bankruptcy Act 1967 ('the Act'). The point was also raised as a preliminary objection at the hearing. The bankrupt argued that no sanction was required as he was not maintaining an action involving third parties. He said his appeals were lodged pursuant to s 92 of the Act to challenge the bankruptcy orders made against him as s 92(1) conferred upon the court the power to 'review, rescind or vary any order made by it under its bankruptcy jurisdiction'. The dissenting judge in the appeal took the view that the test to determine whether prior sanction of the DGI should be obtained in a given case was as propounded by the High Court in *Re Khoo Kim Hock* [1974] 2 MLJ 29 ie whether the application by the bankrupt involved 'property' as defined by s 2 of the Act. If the application involved property as defined in the Act, then, to the extent the property vested in the DGI, by reason of the applicant being a

bankrupt, prior sanction of the DGI was necessary. In all other cases such sanction was not necessary.

Held, striking out the appeals with no order as to costs:

(1) (per **Low Hop Bing** and **Abu Samah JJCA**): Upon a true construction of s 38(1)(a) and s 92(1), (2) and (3) of the Act, in the event of any inconsistency, as appeared to be the case in these two appeals, the specific provisions of s 38(1)(a) would prevail over the general provisions in s 92(1), (2) and (3). That being the case, if the bankrupt wished to invoke the provisions of s 92, then the provisions of s 38(1)(a) shall apply to him (see para 17).

(2) (per **Low Hop Bing** and **Abu Samah JJCA**): The steps taken by the bankrupt in filing and prosecuting the two appeals clearly came within the ambit of maintaining an action in s 38(1)(a) and so required the previous sanction of the DGI (see para 24).

(3) (per **Anantham Kasinather JCA, dissenting**): There was no justification for limiting the ratio of the judgment of the court in *Re Khoo Kim Hock* to applications under ss 92(1) and 105(1) of the Act only (see para 33).

(4) (per **Anantham Kasinather JCA, dissenting**): The test propounded in *Re Khoo Kim Hock*, when properly applied, enabled a bankrupt to challenge all orders made by a bankruptcy court in the exercise of its bankruptcy jurisdiction including appeals, as in this case, and even applications to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the DGI (see paras 35–36).

[Bahasa Malaysia summary

Perayu/penghutang penghakiman ('si bankrap')telah memfailkan permohonan membatalkan atau mengetepikan notis kebankrapan, di mana penyampaian dan petisyen pemiutang dalam prosiding kebankrapan telah difailkan terhadapnya oleh responden/pemiutang penghakiman. Permohonan itu telah ditolak oleh pendaftar. Rayuan telah difailkan terhadap keputusan tersebut kepada hakim dalam kamar (lampiran 26). Sebelum rayuan dapat didengar, responden telah memperoleh perintah-perintah penghukuman dan penerimaan ('PPDP') terhadap si bankrap. Rayuan terhadap PPDP kepada hakim dalam kamar telah difailkan (lampiran 29). Berikutan itu, kedua-dua lampiran 26 dan 29 telah didengar oleh hakim dan ditolak. Si bankrap telah merayu terhadap penolakan-penolakan tersebut kepada Mahkamah Rayuan. Di Mahkamah Rayuan, responden telah memfailkan notis usul untuk membatalkan rayuan-rayuan si bankrap atas alasan dia tidak kompeten untuk mengekalkan rayuan-rayuan tersebut kerana dia tidak memperoleh sanksi Ketua Pengarah Insolvensi ('KPI') menurut s 38(1)(a) Akta Kebankrapan 1967 ('Akta'). Perkara tersebut ditimbulkan juga sebagai bantahan awal semasa

perbicaraan. Si bankrap berhujah bahawa tiada sanksi diperlukan kerana dia tidak meneruskan tindakan melibatkan pihak ketiga. Dia berkata rayuan-rayuannya dibuat menurut s 92 Akta untuk mencabar perintah-perintah kebankrapan yang dibuat terhadapnya kerana s 92(1) memberikan mahkamah kuasa-kuasa untuk 'review, rescind or vary any order made by it under its bankruptcy jurisdiction'. Hakim yang menentang dalam rayuan ini berpendapat bahawa ujian untuk menentukan sama ada diperlukan sanksi daripada KPI patut diperoleh terlebih dahulu dalam suatu kes sepertimana diputuskan dalam kes Mahkamah Tinggi, *Re Khoo Kim Hock* [1974] 2 MLJ 29 iaitu sama ada permohonan oleh si bankrap melibatkan 'property' sepertimana ditafsirkan oleh s 2 Akta. Jika permohonan melibatkan hartanah sepertimana ditafsirkan dalam Akta maka setakat mana hartanah itu diberikan kepada KPI, oleh kerana pemohon seorang bankrap, sanksi KPI perlu diperoleh terlebih dahulu. Dalam semua kes lain sanksi sedemikian adalah tidak perlu.

Diputuskan, membatalkan rayuan-rayuan tanpa perintah terhadap kos:

(1) (oleh **Low Hop Bing** dan **Abu Samah HHMR**) Berdasarkan pentafsiran dan ss 38(1)(a), dan s 92(1), (2) dan (3), Akta, sekira terdapat apa-apa yang tidak konsisten, seperti dalam kes kedua-dua rayuan tersebut, peruntukan-peruntukan spesifik s 38(1)(a) mengatasi peruntukan-peruntukan am dalam s 92(1), (2) dan (3). Dalam keadaan sedemikian, jika seorang bankrap yang ingin menggunakan peruntukan s 92 maka s 38(1)(a) hendaklah terpakai ke atasnya (lihat perenggan 17).

(2) (oleh **Low Hop Bing** dan **Abu Samah HHMR**) Langkah-langkah yang diambil oleh si bankrap dalam memfailkan dan mengendalikan dua rayuan itu jelas dalam skop untuk mengekalkan tindakan dalam s 38(1)(a) dan perlu mendapat sanksi KPI terlebih dahulu (lihat perenggan 24).

(3) (oleh **Anantham Kasinather HMR, menentang**) Tiada justifikasi untuk menghadkan nisbah penghakiman mahkamah dalam kes *Re Khoo Kim Hock* kepada permohonan-permohonan di bawah ss 92(1) dan 105(1) Akta sahaja (lihat perenggan 33).

(4) (oleh **Anantham Kasinather HMR, menentang**) Ujian yang dinyatakan dalam kes *Re Khoo Kim Hock*, apabila diterima pakai sewajarnya, membolehkan si bankrap mencabar semua perintah yang dibuat oleh mahkamah kebankrapan bagi melaksanakan bidang kuasa kebankrapannya termasuklah rayuan-rayuan, sepertimana dalam kes ini, dan permohonan-permohonan untuk mengetepikan penghakiman membentuk perkara utama prosiding kebankrapan tanpa perlu mendapat sanksi KPI (lihat perenggan 35–36).]

Notes

For cases on capacity of bankrupt, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2725–2759.

Cases referred to

Amos William Dawe v Development & Commercial Bank (Ltd) Berhad [1981] 1 MLJ 230, FC (refd)

Bathamani Suppiah v Southern Finance Company Bhd [2000] 2 CLJ 650, HC (refd)

Chin Sin Lan v Delta Finance Bhd [2002] 1 CLJ 266, HC (refd)

Christopher Tan Kok Ching v Bolhassan Di (No 2) [1998] 5 CLJ 177, HC (refd)

Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd, Re [1997] 3 CLJ Supp 174, HC (refd)

Gan Wee Kuan, Ex p Bank Bumiputra Malaysia Bhd, (Mentakab), Re [2002] 5 CLJ 113, HC (refd)

Khoo Kim Hock, Re [1974] 2 MLJ 29, HC (refd)

Lim Tai Nian, Ex p Kewangan Utama Bhd, Re [2001] 4 MLJ 78; [2002] 1 CLJ 41, HC (refd)

Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd, Re [1997] 4 CLJ 185, HC (refd)

Mat Sari bin Hamid Ex parte United Asian Bank Bhd, Re [1993] 1 CLJ 202, HC (refd)

M/s Laksamana Realty Sdn Bhd v Goh Eng Hwa [2004] 1 CLJ 274, CA (refd)

Perwira Ariffin Bank Bhd v Sardar Mohd Roshan Khan [2009] 4 MLJ 201; [2009] 4 CLJ 34, CA (refd)

Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1996] 4 MLJ 233, HC (refd)

Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 2 MLJ 588, HC (refd)

Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khayam Enterprise) v Perwira Affin Bank (formerly known as Perwira Habib Bank Malaysia Bhd) and another appeal [2010] 4 MLJ 285; [2010] 2 CLJ 661, FC (refd)

Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd, Re [1990] 3 MLJ 248, HC (refd)

Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors [1993] 2 MLJ 29, HC (refd)

Tan King Hiang v United Engineers (Singapore) Pte Ltd [2005] 3 SLR 529, CA (refd)

Teoh Seow Chiew; Ex parte AmBank (M), Re [2009] 3 MLJ 90, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 7(1), (2), 38(1)(a), 92, 92(1), (2), (3), 105(1)

Rules of the Court of Appeal 1994 rr 4, 76

A Rules of the High Court 1980 O 18 r 19(1)(b), (d)

Appeal from: Bankruptcy Matter No 29–2098 of 1995 (High Court, Shah Alam)

B *SS Muker (Daljeet Singh Sachdev with him) for the appellant.*
YS Cheah (M Menon with him) (Jaffar & Menon) for the respondent.

Low Hop Bing JCA:

C NOTICE OF MOTION

[1] Pursuant to rr 4 and 76 of the Rules of the Court of Appeal 1994 read with O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980, the judgment creditor ('the JC') filed this notice of motion, seeking to strike out the
D appellant's ('the bankrupt's') two appeals, on the ground that the bankrupt has not obtained his discharge and is incompetent to maintain these appeals.

FACTUAL BACKGROUND

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[2] The JC filed a bankruptcy notice for RM2,835,179.38 being the judgment sum obtained on 20 March 1990 against the bankrupt in Kuala Lumpur High Court Suit No D1–22–145 of 1990.

F **[3]** As a result of the bankrupt's failure to comply with the bankruptcy notice, the JC filed a creditor's petition against the bankrupt.

[4] On 28 September 2004, the JC served the creditor's petition on the bankrupt personally.

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[5] On 28 February 2005, the bankrupt filed an application to strike out or set aside the bankruptcy notice, the service thereof and the creditor's petition (collectively, 'the processes').

H

[6] On 8 January 2007, the learned registrar dismissed the bankrupt's application with costs.

[7] On 12 January 2007, the bankrupt filed a notice of appeal to judge in
I chambers (encl 26) against the learned registrar's decision in refusing to set aside or strike out the processes.

[8] On 16 August 2007, the JC obtained from the registrar an adjudication order and receiving order (AO & RO) against the bankrupt.

[9] On 22 August 2007, the bankrupt filed a notice of appeal to judge in chambers (encl 29) against the AO & RO.

[10] On 11 March 2010, the learned High Court Judge dismissed both the appeals, viz encls 26 and 29. Hence, these appeals by the bankrupt.

SANCTION OF DIRECTOR GENERAL OF INSOLVENCY ('DGI')

[11] Learned counsel Mr YS Cheah (Mr M Menon with him) raised a preliminary objection and contended for the JC that the bankrupt has not obtained the previous sanction of the DGI pursuant to s 38(1)(a) of the Bankruptcy Act 1967, and so the bankrupt is legally incompetent to maintain these two appeals (a reference hereinafter to a section is a reference to that section in the Bankruptcy Act 1967). They sought support in:

(a) *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588 (HC);

(b) *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174 (HC);

(c) *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230 (FC);

(d) *Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185 (HC);

(e) *Bathamani Suppiah v Southern Finance Company Bhd* [2000] 2 CLJ 650 (HC);

(f) *Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors* [1993] 2 MLJ 29 (HC);

(g) *Re: Mat Sari bin Hamid Ex parte United Asian Bank Bhd* [1993] 1 CLJ 202 (HC);

(h) *Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 (HC);

(i) *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR 529 (CA) (Singapore);

(j) *Christopher Tan Kok Ching v Bolhassan Di (No 2)* [1998] 5 CLJ 177 (HC);

(k) *M/s Laksamana Realty Sdn Bhd v Goh Eng Hwa* [2004] 1 CLJ 274 (CA);

(l) *Perwira Ariffin Bank Bhd v Sardar Mohd Roshan Khan* [2009] 4 MLJ 201; [2009] 4 CLJ 34 (CA);

(m) *Re Lim Tai Nian, Ex p Kewangan Utama Bhd* [2001] 4 MLJ 78; [2002] 1 CLJ 41 (HC);

(n) *Chin Sin Lan v Delta Finance Bhd* [2002] 1 CLJ 266 (HC);

(o) *Re Khoo Kim Hock* [1974] 2 MLJ 29 (HC); and

(p) *Re Gan Wee Kuan, Ex p Bank Bumiputra Malaysia Bhd, (Mentakab)* [2002] 5 CLJ 113 (HC).

[12] Mr SS Muker (assisted by Mr Daljeet Singh Sachdev) submitted that these appeals were lodged pursuant to s 92 for the purpose of challenging the bankruptcy orders made against the bankrupt and that the bankrupt was not maintaining an action involving third parties. Hence, no sanction was required. The following authorities were cited:

(a) *Re Khoo Kim Hock*;

(b) *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248 (HC);

(c) *Re Lim Tai Nian*; and

(d) *Re Teoh Seow Chiew; Ex parte AmBank (M)* [2009] 3 MLJ 90 (HC).

[13] The above contentions bring about the following question for determination:

> On the basis of the above factual background, and upon a true construction of s 38(1)(a), is the bankrupt who has not obtained the previous sanction of the DGI competent to maintain these two appeals?

[14] I shall begin by looking at s 92(1) on which the bankrupt — JD relies. It confers upon the court the power to 'review, rescind or vary any order made by it under its bankruptcy jurisdiction'.

[15] Section 92(2) provides generally that 'orders in bankruptcy matters shall, at the instance of *any person aggrieved*, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable'. (Emphasis added.) The expression 'any person aggrieved' may be construed to refer to the bankrupt himself, or his creditor(s) where eg the debtor himself petitions for his own bankruptcy under s 7(1) and (2), or even the DGI who shall be deemed to be aggrieved under s 92(3).

[16] Section 38(1)(a) specifically regulates an undischarged bankrupt in the following words:

Undischarged Bankrupt

38 Consequences of refusal of discharge

(1) Where a bankrupt has not obtained his discharge —

(a) the bankrupt shall be incompetent to *maintain any action* (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency. (Emphasis added.)

[17] Upon a true construction of s 38(1)(a) and s 92(1), (2) and (3), in the event of any inconsistency, as appears to be the case in these two appeals, I am of the view that the specific provisions of s 38(1)(a) would prevail over the general provisions in s 92(1), (2) and (3): *generalia specialibus non derogant*. That being the case, if the bankrupt wishes to invoke the provisions of s 92, then the provisions of s 38(1)(a) shall apply to him. It is therefore not surprising that the counsel for the official assignee (now the DGI) had raised the s 38(1)(a) point in *Re Khoo Kim Hock*.

[18] The authorities cited for the bankrupt must now be considered, as follows:

(a) *Re Khoo Kim Hock*, concerns an undischarged bankrupt's application for an order annulling an adjudication order made under s 92(1) and s 105(1). Counsel for the official assignee (now the DGI) raised a preliminary objection on a point of law contending, inter alia, that an undischarged bankrupt was disabled from maintaining the application unless the prior sanction of the OA (now the DGI) was first obtained under s 38(1)(a). *Mohamed Azmi J* (later FCJ) held, inter alia, that s 38(1)(a) does not apply to an application under s 92(1) and s 105(1) where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the OA is necessary.

(b) *Re Khoo Kim Hock*, was followed by VC George J (later JCA) in *Re Sebastian*; by Ian Chin J (as he then was) in *Re Lim Tian Nian*; by Mohd Hishamudin J (now JCA) in *Re Teoh Seow Chiew*; by Sulaiman Daud JC (now JCA) in *Chin Sin Lan*; and by Ramli AH J (now JCA) in *Re Gan Wee Kuan*, respectively in dealing with the same preliminary issue under s 38(1)(a).

[19] On the other hand, in *Re Low Kok Tuan*, with the utmost respect, I did not follow *Re Khoo Kim Hock*, as the applications were readily distinguishable. The matters before me in the High Court were applications for stay of bankruptcy orders and all ancillary and related proceedings, while the undischarged bankrupt's application in *Re Khoo Kim Hock*, sought to annual

bankruptcy orders under s 92(1) and s 105(1). Hence, I held that the previous sanction of the DGI was required in an application for a stay of bankruptcy orders.

[20] My judgment in *Re Low Kok Tuan*, was followed in *Bathamani Suppiah*, by PS Gill J (later FCJ) who at p 652e–f held that for an appeal against a bankruptcy order, sanction of the official assignee (now the DGI) should be obtained. His Lordship observed that *Re Khoo Kim Hock*, 'merely says that the prohibition of s 38(1)(a) does not exclude a bankrupt from applying for a review etc under s 92(1) or s 105(1), but the case is silent on the bankrupt's capacity to appeal, or for that matter to apply to stay proceedings, without the sanction of the official assignee'. Further down in the judgment, the learned judge noted that the 'deliberate omission by the legislature in regard to appeals or stay in s 92(1) and s 105(1) would mean only one thing, that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained'. His Lordship held that 'the appellant lacks the legal capacity to lodge the appeal'.

[21] In so far as the requirement for the previous sanction of the DGI is concerned, judicial interpretations of s 38(1)(a) in the aforesaid judgments of the High Court showed a patently divergent pattern. In my view, these High Court judgments must now be viewed in the light of the unanimous judgment of the Court of Appeal in *Perwira Ariffin Bank Bhd v Sardar Mohd Roshan Khan* [2009] 4 MLJ 201, where two core questions arose for determination, viz:

(a) the bankrupt's competency to maintain an action without the previous sanction of the DGI under s 38(1)(a); and

(b) whether an annulment order operates retrospectively.

[22] The Court of Appeal answered the aforesaid question (two) in the negative ie an annulment order did not operate retrospectively. On appeal, the Federal Court reversed the position and held that the annulment order operated retrospectively: see *Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khayam Enterprise) v Perwira Affin Bank (formerly known as Perwira Habib Bank Malaysia Bhd) and another appeal* [2010] 4 MLJ 285; [2010] 2 CLJ 661 (FC) at pp 674–675, paras 36, 37 and 39.

[23] However, it is significant to note that the Federal Court left open the issue of locus standi in the aforesaid question (one): *see para 41 of the Federal Court judgment at p 675F–G*. In the circumstances, the principles enunciated by the Court of Appeal relating to the requirement for sanction under s 38(1)(a) remain intact. In delivering the judgment of the Court (the other

coram members being Sulong Matjeraie JCA and Ahmad Maarop JCA (now FCJ)), at pp 43C–45B, I took the opportunity to put in place the principles which were relevant to the true construction of s 38(1)(a). The principles applicable to the instant appeals are:

(1) The word 'action', which has not been defined in the Act, must be given its plain meaning ie civil action or civil proceedings in court: per Augustin Paul JC (now FCJ) in *Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174, which in turn referred to *R v Kappave* [1935] MLJ 237;

(2) Such civil action or proceedings include:

(a) The filing of a notice of appeal: *Amos William Dawe v Development & Commercial Bank Ltd Berhad* [1980] 1 LNS 133 FC;*Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185, 189E (HC); and *Bathamani Suppiah v Southern Finance Co Bhd* [2000] 2 CLJ 650 HC;

(b) An application for stay of the bankruptcy proceedings:*Re Lai Hee Sang Ex p Asia Commercial Finance (M) Bhd* [2000] 7 CLJ 302, 304;

(c) An application to set aside a default judgment upon which the bankruptcy proceedings are founded: *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 1 LNS 41 HC; *Supreme Finance (M) Bhd v Mohamad Noor bin Yusuf & Ors* [1993] 1 LNS 158 HC; and *Re: Mat Sari Hamid Ex Parte United Asian Bank Bhd* [1993] 1 CLJ 202, 203 HC;

(d) A counterclaim: *M/s Laksamana Realty Sdn Bhd v Goh Eng Hwa* [2004] 1 CLJ 274;

(See also Khoo Kay Ping's 'Law and Practice of Bankruptcy in Malaysia' 2nd edn p 216);

(3) [not relevant]

(4) [not relevant]

(5) [not relevant]

(6) [not relevant]

(7) The requirement of sanction is not just a formality; it goes to his capacity: per Abdul Hamid Mohamad FCJ (later CJ Malaysia) in *Goh Eng Hwa*, supra, CA at p. 104; and

(8) The steps taken by a bankrupt in civil action or proceedings without the previous consent of the OA in contravention of s.38(1)(a) are null and void: *Goh Eng Hwa, CA*, supra; *Richland Trade & Development Sdn Bhd HC*, supra; and *Christopher Tan Kok Ching v Bolhassan Di (No 2)* [1998] 5 CLJ 177 HC.

[24] *In the instant appeals, I am of the view that the steps taken by the bankrupt in filing and prosecuting these two appeals as adumbrated above clearly come within the ambit of maintaining an action in s 38(1)(a) and so attract the*

application of the principles set out above in relation to s 38(1)(a) ie the requirement for the previous sanction of the DGI. My answer to the above question is therefore in the negative.

CONCLUSION

[25] On the foregoing grounds, I sustain the JC's preliminary objection. The bankrupt's two appeals are struck out with no order as to costs. The decision of the High Court is affirmed. Deposit to the DGI.

[26] My learned brother A Samah Nordin JCA has read my judgment in draft and has expressed his agreement to make it the majority judgment of the court.

Anantham Kasinather JCA (dissenting):

BACKGROUND FACTS

[27] The respondent filed the bankruptcy notice for the sum of RM2,835,179.38, having obtained judgment on 20 March 1990 for this sum against the appellant. The respondent then filed a creditors petition against the appellant arising from the appellant's failure to comply with the bankruptcy notice. The creditors petition was served on the appellant on 28 September 2004. On 28 February 2005, the appellant filed an application (encl 18) to strike out / set aside the bankruptcy notice, service of the bankruptcy notice and creditors petition. On 8 January 2007, the learned deputy registrar dismissed encl 18. On 12 January 2007, the appellant filed the notice of appeal to the judge in chambers (encl 26) against the decision of the learned deputy registrar. On 16 August 2007, an adjudicating order and receiving order ('AO' and 'RO') was made against the appellant. On 22 August 2007, the appellant filed the notice of appeal to the judge in chambers against the decision of the learned senior assistant registrar in granting the AO and RO (encl 29). On 11 March 2010, thelearned High Court judge dismissed encls 26 and 29. The present appeal is in respect of the orders of the High Court dismissing encls 26 and 29. In respect of this appeal itself, the respondent filed the motion to strike out the notice of appeal pursuant to rr 4 and 76 of the Rules of Court of Appeal 1994. The basis for the motion is that the appellant has no locus to pursue this appeal by reason of the provisions of s 38(1)(a) of the Bankruptcy Act 1967 (the said Act).

[28] Section 38(1)(a) of the said Act reads as follows:

> Where a bankrupt has not obtained his discharge —
>
> (a) The bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee

[29] Counsel for the respondent in his written submission referred to a passage in the judgment of Siti Norma Yaakob J (as Her Ladyship then was) as authority for the proposition that a bankrupt cannot commence any form of proceedings other than an action for damages for injury to his person or when he challenges his status by filing an application under s 92(1) or s 105(1) of the Bankruptcy Act (see *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd* [1992] 2 MLJ 588 at p 590). Counsel for the appellant conceded that the word 'action' has not been defined in the said Act. Counsel cited the passage in the judgment of His Lordship Augustine Paul JC (as His Lordship then was) and submitted that the meaning of the word 'action' was confined 'in its operation to civil proceeding in court and not to conveyance of property as in the appeal before me' (see *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174 at p 179).

[30] In my judgment, the pronouncements of Her Ladyship Siti Norma and Justice Augustine Paul in the aforesaid two cases do not afford a basis for the respondent's motion. In the case of *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd*, the principles of law enunciated by Azmi J (as His Lordship then was) in the authoritative decision of the Court in *Re Khoo Kim Hock* [1974] 2 MLJ 29 were not considered by the court. With respect, the pronouncements of Augustine Paul JC in the case of *Re Chua Tin Hong Ex Parte Castrol (M) Sdn Bhd*, do not advance the respondent's motion since the facts of the case involved an attempted conveyance by the bankrupt of land of which he was the registered proprietor. It is trite law that upon the making of the AO and RO, the property of the bankrupt vest in the official assignee.

[31] In my judgment, the outcome of the respondent's motion should be decided by the ratio in the case of *Re Ko Kim Hock*. His Lordship Mohamad Azmi J (as His Lordship then was) when dealing with the issue of sanction under s 38(1)(a) of the said Act had this to say:

> The first question for determination is whether the requirement of sanction of the official assignee under s 38(1)(a) applies only to a bankrupt's ordinary claims, ie maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankrupt Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something — either real or personal — which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in ss 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the official assignee before a bankrupt

A can seek relief under those provisions. Under s 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purposes he should first obtain the sanction of anyone. This is also the case where an application is made to the court under ss 92(1) and 105(1) of the Act. It is true that s 24(4) provides that when a debtor is adjudged B bankrupt his property shall become divisible amongst his creditors and shall vest in the official assignee. The word 'property' is defined by s 2 to include 'money, goods, things in action, land an every description of property, whether real or personal, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined'. C As such, only property as defined above would vest in the official assignee at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of s 2. The present application being not things in action or chose in action cannot be described as something which can be turned into asset for the estate D of the bankrupt The expression 'chose in action' or 'things in action' in the literal sense has been described to mean a thing recoverable by action as contrasted with the chose in possession, namely, a thing of which a person has not only ownership but also actual physical possession. The meaning of the expression has varied from time to time, but it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in E respect of both corporeal and incorporeal personal property which is not in possession, (see *Words and Phrases Legally Defined*, Vol I). Under the circumstances, the case of *K Ismail Ganey Rowther* referred to above is no authority for the proposition that an undischarged bankrupt in Malaysia is disabled from making the present application without the previous sanction of the official assignee. In that F case, where the court had considered s 33(i)(a) of the Bankruptcy Enactment 1912, which is the forerunner of our present s 38(1)(a), Thome Ag CJ. Rightly did not accept the proposition that the words 'without the previous sanction of the official assignee' mean that if the bankrupt received the sanction of the official assignee he could maintain an action in respect of any property of any kind whatsoever which G was in his order and disposition at the time of the bankruptcy. In his view, the legislature did not intend, and the section did not mean that by his sanction the official assignee can divest himself of the property either real or personal, which is vested in him by the receiving order or under an order of adjudication and revest that property in the bankrupt for the purpose of bringing an action. It is therefore clear H that the legal proposition as expounded by Thome Ag CJ. Is only confined to the property of a bankrupt which is vested in the official assignee. In my view, since the present application does not come within the meaning of 'property' as defined by s 2, it does not vest in the official assignee, and as such it is not necessary for the bankrupt to obtain the prior sanction of the official assignee. I am fortified in this I conclusion by *Halsbury*, Vol 3, (4th Ed), at paras 556 and 558. Paragraph 556 provides that the rights of claims which the trustee may enforce by action, or in respect of which he may be liable as representing the estate, fall into two classes, namely (1) actions which at the commencement of the bankruptcy are pending by or against the bankrupt, and (2) rights of action which are vested in the bankrupt at the commencement of the bankruptcy, or which devolve on the bankrupt before he

obtains his discharge. In the present case, we are only concerned with the latter class, and at para 558, *Halsbury* has this to say:

> The rights falling under the second class may be enforced by action by the trustee, unless the cause of action is one which from its nature does not vest in the trustee, or to the benefit of which the estate is not entitled, such as rights of action in respect of personal damage or injury …

Accordingly, just as right of action in respect of personal damage and injury (which is excluded under s 38(1)(a) from prior sanction) is a cause of action to the benefit of which the estate is not entitled, the application in the present case is one which from its nature does not vest in the official assignee. Under the circumstances, I hold that s 38(1)(a) does not apply to an application under ss 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the official assignee is necessary in the present case.

[32] Counsel for the appellant does not challenge the correctness of either the decision or the reasoning of Azmi J in *Re Ko Kim Hock*. However, counsel for the appellant submitted that the ratio of the decision in *Re Ko Kim Hock* is only applicable when the bankrupt is applying to annul the AO and RO pursuant to an application under ss 92(1) or 105(1) of the Bankruptcy Act. This submission of counsel has the support of the decision of the High Court in the case of *Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185. Justice Low Hop Bing (as His Lordship then was) when dealing with an application by the bankrupt for a stay of the creditors petition pending disposal of an appeal to the judge in chambers opined to the following effect:

> In my judgment, it is trite law that upon a person being adjudged a bankrupt, all his affairs become vested in the official assignee: s 38(1)(a) of the Bankruptcy Act 1967, (the Act'). This prohibition no doubt excludes an application by an undischarged bankrupt seeking an order of the court under ss 92(1) and 105(1) of the Act to review, rescind or vary any order made by it: *Re Khoo Kim Hock*. The question before me is whether the principle in *Re Khoo Kim Hock*, applies to the facts of the instant case. *Re Khoo Kim Hock* revolves around an undischarged bankrupt's application to annul bankruptcy orders under ss 92(1) and 105(1) of the Act. A quick look at the headnote of that case is sufficient to demonstrate that it has absolutely no application to the facts of the instant case. Enclosure (17) herein and, for that matter, encl (13) are not applications seeking an order to annul bankruptcy orders, but are applications for a stay of the bankruptcy orders and all ancillary and related proceedings. Accordingly, *Re Khoo Kim Hock* is of no assistance to the appellant in encl (17). That being the case, I hold that the appellant lacks the legal capacity to lodge this appeal against the decision of the deputy registrar who has refused the appellant's application for stay of the creditor's petition and all ancillary and related proceedings.

[33] With respect, in my judgment, there is no justification for limiting the ratio of the judgment of the Court in *Re Khoo Kim Hock* to applications under

ss 92(1) or 105(1) of the Bankruptcy Act only. His Lordship Azmi J expressly stated in the judgment of the court that it was His Lordship's considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he seeking the court's discretion, to review, rescind or vary any order made by it under its bankruptcy jurisdiction. His Lordship further pronounced that:

> the exception contained within brackets in s 38(1)(a) clearly indicates that the section is intended to apply to actions for recovery of something either real or personal — which can be turned Into assets such as a claim for recovery of property or money due.

[34] His Lordship then explained that the test as to whether the bankrupt required the sanction of the court should be determined on whether the application involved 'property' as defined by s 2 of the said Act. The rationale for this test being that if the application involved, property as defined in the Act, then, to the extent that the property vested in the official assignee, by reason of the applicant being a bankrupt, the prior sanction of the official assignee was necessary. In all other cases, the sanction of the official assignee was not necessary. His Lordship fortified his conclusion by a passage in *Halsbury* that the sanction of the trustee is not necessary in cases where the cause of action is one which from its nature does not vest in the trustee or to the benefit of which the estate is not entitled, such as rights of action in respect of personal damage or injury. Applying the aforesaid test to the application before His Lordship in the case of *Re Khoo Kim Hock*, His Lordship ruled that applications under ss 92(1) or 105(1) of the Bankruptcy Actdo not require the previous sanction of the official assignee.

[35] With utmost respect, I cannot agree with the decision of His Lordship justice Low Hop Bing because His Lordship without applying the test propounded by Azmi J ruled that the decision in *Re Khoo Kim Hock* only applied to applications by the bankrupt under ss 92(1) and 105(1) of the Act. In my judgment, the test propounded by Azmi J when properly applied as was the case in the judgment of the court in *Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185 allows a bankrupt to apply for stay or appeal against orders in bankruptcy matters without the sanction of the official assignee. In this case, the application before the court was whether a bankrupt could appeal against an order making him a bankrupt without the prior sanction of the official assignee. His Lordship Ian Chin (as His Lordship then was) pronounced his opinion on the implications of the decision of Azmi J on the application before him in this manner:

Clearly then, on the authority of *Re Khoo Kim Hock* an appeal by an undischarged bankrupt is not caught by s 38(1) and therefore no prior sanction of the official assignee is required. Section 92 is in substance the same as the English s 108 where the bankrupt in *Re Baron* was able to appeal without any sanction. Now s 92 is not concerned only with adjudication orders only but with 'order made … under its bankruptcy jurisdiction' and 'orders in bankruptcy matter'. The plain and simple meaning of those terms would include, for example, order of stay or refusal of stay or order of extension or refusal of extension of time to do sometime.

Therefore, I am unable to agree with *Re Low Kok Tuan* which, though it did not disagree with *Re Khoo Kim Hock*, decided that an undischarged bankrupt cannot appeal against an order refusing a stay of the bankruptcy petition. After all, the right to appeal is not a chose in action that can be vested in the official assignee as said in *Re Khoo Kim Hock*. For those reasons too, I am unable to agree with Bathamani. At the hearing of the bankruptcy petition, the official assignee is required to state whether the supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt can never appeal against an order made against him, no matter if there is injustice in the making of the order. Such a construction of the law should not be had. For that reason too I am unable to agree with the said two decisions. Therefore, I am of the view that an undischarged bankrupt has a right to appeal against any order made by the court in exercise of its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so.

[36] In my judgment, the test propounded by Azmi J when properly applied enables a bankrupt to challenge all orders made by a bankruptcy court in the exercise of its bankruptcy jurisdiction including appeals as in this case and even applications to set aside a judgment forming the subject matter of the bankruptcy proceedings without the need to obtain the sanction of the official assignee. For the last proposition, I wish to adopt the reasoning behind the judgment of Sulaiman Daud JC (as His Lordship then was) in the case of *Chin Sin Lan v Delta Finance Bhd* [2002] 1 CLJ 266. Accordingly, I dismiss the motion.

Striking out the appeals with no order as to costs.

Reported by Ashok Kumar